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FOURTH AMENDMENT

Do the Police Seize a Person under the Fourth Amendment by Using Deadly Force If That Person Gets Away?

CASE AT A GLANCE

Respondents Janice Madrid and Richard Williamson, two New Mexico State Police officers, shot and wounded petitioner Roxanne Torres to restrain her during an investigation. Petitioner escaped, however, and was not arrested until the next day at a hospital. Petitioner sued respondents in federal court for using unlawful deadly force under the Fourth Amendment. The district court granted summary judgment for respondents, finding that they did not "seize" petitioner when they shot her because petitioner eluded police custody. Petitioner appealed, and the Court of Appeals for the Tenth Circuit affirmed. Petitioner asks the Supreme Court to reverse and hold that whenever the police use deadly force to restrain someone, the police seize that person under the Fourth Amendment, even if the person eludes police custody.

Torres v. Madrid
Docket No. 19-292

Argument Date: **October 14, 2020** From: **The Tenth Circuit**

by Brooks Holland
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Issue

Do the police seize a person under the Fourth Amendment when they use deadly force to restrain that person if that person eludes police custody?

Facts

On the morning of July 15, 2014 respondents, Janice Madrid and Richard Williamson, two New Mexico State Police officers, went to an Albuquerque apartment complex to arrest a woman for organized crime activities. This suspect was not petitioner, Roxanne Torres. When respondents arrived, they saw two individuals standing outside the suspect's apartment next to a vehicle. One of these individuals was petitioner. The vehicle was backed into a parking spot between two other vehicles. Respondents approached to determine the individuals' identity. Respondents wore tactical vests that had police markings.

When respondents approached, one individual fled into the apartment, but petitioner got into and started the parked vehicle. Petitioner was "tripping" from using meth for a couple of days. Respondent Williamson stood next to the closed and tinted driver-side window and demanded that petitioner show her hands, as she was making "furtive movements." Respondent Madrid positioned herself near the vehicle's driver-side front tire. Respondent Madrid perceived that petitioner was making "aggressive movements."

Petitioner claimed she did not know respondents were police officers, and believed they were carjackers. Petitioner thus put the car into drive, prompting respondents to draw their firearms. When respondent moved the vehicle forward, respondents both shot into the vehicle. Respondents claimed they believed petitioner

would run over them or crush them against another vehicle. Respondents fired thirteen total shots into the vehicle as petitioner drove away from them. Two bullets struck petitioner.

Petitioner nevertheless was able to drive forward over a curb, through some landscaping, and onto a street, finally crashing into another vehicle in a parking lot. Petitioner exited the vehicle and laid down on the street to "surrender" to the carjackers, asking a bystander to call the police. Petitioner decided not to wait, however, because she had an outstanding warrant, so she stole a nearby vehicle that was running. Petitioner drove 75 miles to another city and checked herself into a hospital. The hospital airlifted petitioner to an Albuquerque hospital where she was arrested by the police on June 16, 2014, one day after the shooting.

Petitioner pleaded no contest to crimes arising from the shooting incident. But petitioner later filed a federal civil rights lawsuit against respondents, asserting that they employed excessive force by shooting her. The district court treated the excessive force claim as a Fourth Amendment claim, and granted summary judgment for the officers. The district court concluded that because respondents did not achieve physical control over petitioner in shooting her, respondents did not "seize" her under the Fourth Amendment. Accordingly, respondents were entitled to a judgment in their favor without a trial, regardless of whether they reasonably believed deadly force against petitioner was necessary.

Petitioner appealed to the Court of Appeals for the Tenth Circuit. Citing to prior Tenth Circuit authority, the court of appeals held that "an officer's intentional shooting of a suspect does not effect a seizure unless the 'gunshot… terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him." The court of appeals thus affirmed the district court's grant of summary judgment because respondents' "use of deadly force against [petitioner] failed to 'control [her] ability to evade capture or control.'"

Petitioner sought a writ of *certiorari* to the Supreme Court. The Court granted the writ on December 18, 2019. *See Torres v. Madrid,* 140 S. Ct. 680 (2019).

Case Analysis

This case returns the Supreme Court to the topic of excessive force claims against the police. The Court has previously held that when the police use deadly force against an individual, that use of force is a "seizure" under the Fourth Amendment. *See Tennessee v. Garner,* 471 U.S. 1 (1985). If the police do not reasonably believe that their use of deadly force is necessary, the police can be liable for damages under 42 U.S.C. § 1983. *See Graham v. Connor,* 490 U.S. 386 (1989).

In many of these excessive force cases, the issue is whether the police reasonably believed that deadly force was necessary under all of the circumstances. In this case, however, the question instead is whether respondents even seized petitioner in the first place because, notwithstanding respondents' use of deadly force, petitioner eluded police custody for a full day. Petitioner argues that respondents seized her under the Fourth Amendment the moment their bullets hit her body. Respondents, by contrast, contend that even though they shot her, she escaped, and thus they did not seize her until they arrested her the next day at the hospital.

The main Supreme Court case on this issue is *California v. Hodari D.,* 499 U.S. 621 (1991). Two police officers approached Hodari D., but he fled on foot. An officer chased Hodari D., and during the chase, Hodari D. discarded cocaine, which the officer recovered after tackling him. Hodari D. argued that the cocaine should be suppressed because the police officer unlawfully seized him by chasing him, prompting him to discard the cocaine. The Court disagreed that the police seize a fleeing person solely by chasing him. Rather, the Court held that the seizure of a person under the Fourth Amendment "requires *either* physical force…*or,* where that is absent, *submission* to the assertion of authority." (emphases in original). Because Hodari D. did not submit to the officer's show of authority by chasing him, the officer did not seize Hodari D. until the officer tackled him.

Petitioner argues that this analysis in *Hodari D.* reflects an original meaning to the Fourth Amendment, incorporating the common law of arrests. The common law of arrests, petitioner maintains, recognizes an arrest in either of two circumstances: (1) a show of police authority to which a person submits; or (2) the application of physical force with the intent to restrain, regardless of whether that force is successful. In support of this position, petitioner travels through centuries of common law authorities standing for the proposition that "an intended physical touching intended to restrain was an arrest—and thus a seizure under the original meaning of the Fourth Amendment—even if the suspect evaded capture." The Fourth Amendment, petitioner asserts, should not offer

less protection now than what the law of arrests afforded at the Fourth Amendment's adoption.

According to petitioner, *Hodari D.* and other Supreme Court precedents reinforce this "common-law understanding relied upon by the Framers." Petitioner emphasizes a particular quote from *Hodari D.*: "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, *even when it is ultimately unsuccessful.*" Petitioner further observes that the Supreme Court has repeatedly identified intrusions into the human body as quintessential cases of police action governed by the Fourth Amendment. The cited examples of physical intrusion include DWI blood draws, surgical extraction of a bullet, DNA cheek swabs, and fingernail scrapes. Thus, petitioner contends, "[t]he Fourth Amendment draws a line of protection around the body, and officers must have justification to cross it."

Respondents argue for a narrower definition of a Fourth Amendment seizure, requiring that the police "intentionally tak[e] possession, custody, or control of a person." Respondents contend that "*Hodari D.* is factually inapposite from this case," because "*Hodari D.* did not involve a use of physical force." Therefore, "the common law rule articulated in *Hodari D.* has no relevance," offering "'no more than common law *dicta.*'" Respondents observe that "[w]hile the common law can be interesting, and sometimes informative to issues before the Court, it is certainly not dispositive." Respondents also distinguish the more contemporary bodily intrusion cases cited by petitioner because they involved Fourth Amendment searches, not the seizure of a person as petitioner's claim entails.

Instead, respondents highlight language in Supreme Court and lower court decisions that emphasize restraint of a person's freedom of movement as central to whether a seizure has occurred under the Fourth Amendment. For example, in *United States v. Mendenhall,* 446 U.S. 544 (1980), the Supreme Court wrote that a person is seized "only when, by means of physical force or show of authority, his [or her] freedom of movement is restrained." Respondents additionally emphasize *Brower v. County of Inyo,* 489 U.S. 593 (1989), in which the police deployed a roadblock into which a fleeing auto-theft suspect fatally crashed. In finding that the roadblock "seized" the fleeing suspect, the Supreme Court held:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement…nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement…but only when there is a governmental termination of freedom of movement.

Respondents also dedicate significant time to a previous decision by the Court of Appeals for the Tenth Circuit, *Brooks v. Gaenzle,* 614 F.3d 1213 (10th Cir. 2010). This decision tracks respondents' argument that a seizure should not divorce police force from whether that force successfully restrains a suspect's freedom of movement. Normally, a circuit court opinion might offer only limited authority in the Supreme Court on a constitutional question. But as respondents indicate in a footnote, "[t]hen-Judge Neil Gorsuch was a member of the Tenth-Circuit panel that decided *Brooks.*"

From these decisions, respondents argue that "[e]ven where some level of force is intentionally applied by a law enforcement officer, unless that force results in the actual termination of the suspect's movement, no seizure has occurred." An attempted seizure, in respondents' view, is no seizure at all. Respondents thus define their position succinctly: "Petitioner simply did not stop after she was shot, and therefore [she] was not seized."

Petitioner counters that respondents selectively quote from Supreme Court decisions such as *Brower* to conflate two distinct common law theories for a seizure: (1) police "show-of-authority" cases, where the suspect must submit before a seizure occurs; and (2) police "use-of-force" cases, where the seizure is complete with the intentional application of physical force. Nothing in contemporary Fourth Amendment jurisprudence, petitioner maintains, departs from this model. On the contrary, *Hodari D.* embraces this model, and cases like *Brower* illustrate that while submission by a suspect may be sufficient to establish a seizure, it is not necessary in cases where the police use actual force.

Petitioner also claims that respondents overdetermine her argument. Petitioner denies she is extending the Fourth Amendment to include attempted seizures. Rather, petitioner argues that the intentional use of force is itself a completed seizure, because that force interferes with a person's physical liberty. A person's escape follows the seizure, affecting its scope, but it does not negate the seizure itself. The requirement of intent, petitioner adds, avoids the problem suggested by respondents of persons

claiming a police seizure from inadvertent contact unrelated to an intent to detain. Finally, petitioner notes that a rule that defines a police seizure by the intentional use of force will not expose the police to unwarranted liability. The Fourth Amendment also requires the use of force to be unreasonable, and for civil liability, to satisfy qualified immunity, "which protects 'all but the plainly incompetent or those who knowingly violate the law.'"

This case drew a number of briefs from a diverse group of interested parties, including the American Civil Liberties Union, the NAACP Legal Defense and Education Fund, the Cato Institute, and the United States Department of Justice. All of these amici side with petitioner that deadly force by the police should constitute a Fourth Amendment seizure, regardless of whether the police successfully subdue the suspect. These amici agree with petitioner that *Hodari D.* and other leading Fourth Amendment authorities properly distinguish between police seizures through a show of authority and seizures through the police use of force: the former theory requires submission by the suspect, but the latter theory does not. As the United States illustrates, because the police used deadly force against petitioner, the question determining the outcome of this case should not be whether respondents *seized* petitioner, but whether that use of force was *reasonable*.

Significance

The parties' arguments frame an important dichotomy for Fourth Amendment jurisprudence. Petitioner defines "seizure" to include any police use of force that intentionally intrudes into a person's physical autonomy or security, regardless of whether that force successfully subdues the person. Respondents, by contrast, define "seizure" more literally, to mean police force that successfully subdues a person, giving the police control over that person's movement.

The amici highlight implications of respondents' narrow definition of a seizure. The NAACP and Cato Institute, for example, address the lack of accountability that may result if the police can use deadly force outside of Fourth Amendment constraints, especially in minority and poor communities. A collection of Fourth Amendment scholars further observes that respondents' position "has the perverse effect of immunizing police officers' use of force—even deadly force—from all constitutional scrutiny whenever that use of force did not succeed in subduing the suspect." The Rutherford Institute amplifies the lack of accountability in jurisdictions that limit alternative state tort claims or that do not effectively pursue citizen complaints or criminal prosecution of police officers.

Petitioner adds some significant evidentiary questions that would arise if respondents' position is adopted. For example, petitioner asks:

> What counts as termination of movement? How soon after the force is applied must the person come to a stop?…If she stumbles a few feet before coming to a halt, has the shot terminated her movement?…And how long must the person remain stopped for her to be considered under the officer's control? Where is the line between just a momentary pause and a complete halt?

By contrast, if petitioner prevails, police use-of-force cases would uniformly fall under Fourth Amendment constraints, even when a suspect escapes. The question in each use-of-force case would be whether, under all of the circumstances, the police reasonably believed that force, or deadly force, was necessary.

Courts, however, would need to define the scope of a seizure when the police use force against an individual who escapes. This scope could be important in both civil and criminal cases. For instance, in petitioner's case, if she had died from blood loss after escaping and driving to a hospital in another location, could respondents have been liable for wrongful death, not just the immediate gunshot injuries they inflicted? If petitioner had confessed to hospital personnel after the shooting, could that confession be subject to the exclusionary rule as the product of custodial interrogation? Would the exclusionary rule apply if petitioner had thrown a bag of drugs out of the vehicle window when fleeing from respondents' gunshots? How far would the consequences of a seizure extend if respondents had used only non-deadly force?

Petitioner notes that her Section 1983 claim does not raise these "continuing seizure" and other scope questions. But these questions illustrate why petitioner's position would necessitate that courts determine when a person's voluntary conduct or other intervening events terminate the scope of a Fourth Amendment seizure-by-force.

Conclusion

The law governing police use of force, especially deadly force, is receiving understandable scrutiny, as the many briefs supporting petitioner illustrate. With two recently

appointed Justices, Neil Gorsuch and Brett Kavanaugh, the Supreme Court's alignment around this particular question is uncertain, especially if Justice Gorsuch's participation in the Tenth Circuit's decision in *Brooks* signals his perspective. Either way, oral argument may preview the Supreme Court's direction in this important area of Fourth Amendment law, which balances concern for police accountability against concern for excessive police liability.

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In Support of Respondents Janice Madrid, et al.

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